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VISA U.S.A. INC.

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12

13 VISA U.S.A. INC.,

14 Plaintiff,

15 vs.

16 MARITZ INC., d/b/a MARITZ
17 LOYALTY MARKETING,

18 Defendant.

19 AND RELATED COUNTERCLAIMS.
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Case No. CV-07-5585 JSW

**PLAINTIFF VISA U.S.A. INC.'S
OPPOSITION TO DEFENDANT MARITZ
INC.'S REQUEST FOR DISCOVERY**

Date: February 22, 2008
Time: 1:30 p.m.
Dept: Courtroom 2 (17th Floor)
Judge: Hon. Jeffrey S. White

SUMMARY OF ARGUMENT

Maritz's request for discovery must be denied for two primary reasons. First, Maritz fails to demonstrate that it needs discovery. It has provided lengthy declarations attempting to establish its fraudulent inducement theory. Moreover, what Maritz argues is the critical fact to its claim – that “Visa knew the nature and magnitude of its damages claims prior to sending the July 9, 2007 letter” (Maritz's Brief In Support of Discovery (“Maritz's Brief”), 6:3-4) – is undisputed: prior to the execution of the Letter Agreement Visa knew that its claim “was considerable, in the range of tens of millions.” (Thompson Motion To Stay Decl., ¶ 9.) Although Maritz provides a laundry list of discovery it wishes to take, it fails to show *why* it needs any discovery to respond to Visa's motion to stay this action, much less any of the items of discovery it lists. Second, Maritz fails to produce facts sufficient to show that Visa had a duty to make any disclosure beyond that which it undeniably made. Visa's April 20, 2007 letter states unambiguously:

We reserve all rights relating to or arising out of the Agreement and any Related Agreement, including without limitation, **claims Visa has against Maritz for Maritz's breaches of the Agreement, Maritz's non performance or delay in performing any obligations due under the Agreement, and Visa's right to liquidated damages.**

Similar language appears in Visa's June 5 and July 2 letters. Each of those letters unambiguously disclosed to Maritz that Visa contended that Maritz had breached the parties' contract and was liable for damages for both its non-performance and under the contract's liquidated damages clause. Maritz ignores these crucial statements in its brief. Distilled to its essence, Maritz's fraud argument is that its Associate General Counsel misunderstood the plain language of Visa's written communications and that Visa had some duty to divine and then correct Maritz's unexpressed misunderstanding. As a matter of law, however, this is insufficient: Maritz's unexpressed misunderstanding of those letters cannot create an obligation on Visa's part to disclose. Because the undisputed facts demonstrate that Visa had no duty to disclose an estimate of its damages prior to the execution of the Letter Agreement, there is no need for discovery before the Court decides Visa's motion to stay the action and compel arbitration.

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1 **I. INTRODUCTION**

2 Maritz's fraud claim is predicated on its allegation that "Visa failed to disclose to Maritz
3 that Visa was planning to assert that Maritz had defaulted and Visa was entitled to receive tens
4 of millions of dollars from Maritz for Maritz's alleged breaches of the MSA." (D.E. #19,
5 Maritz's Counterclaim, ¶ 117.) Yet, "[t]he concealment of a material fact is not actionable unless
6 there is a duty to disclose." *People v. Highland Fed. Sav. & Loan*, 14 Cal. App. 4th 1692, 1718
7 (1993); *see also Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th Cir. 1988)
8 (*overruled on other grounds by Ticknor v. Choice Hotels Int'l Inc.*, 265 F.3d 931, 941-942 (9th
9 Cir. 2001)) (for "mere omission to constitute actionable fraud, a plaintiff must first demonstrate
10 that a defendant had a duty to disclose the fact at issue"). In its Order denying Maritz's *ex parte*
11 motion to continue Visa's pending Motion to Stay, the Court advised that it was "particularly
12 concerned with whether there was any duty to exercise reasonable care to disclose the matter(s)
13 potentially in question." (D.E. #44, Amended Order at 2:2-4.)

14 The Court's concern is well taken. Maritz has failed to identify any *fact* that supports a
15 finding that Visa had a duty to disclose "the nature and amount" of its damages claims prior to the
16 execution of the Letter Agreement. Although Maritz purports to need several depositions
17 (including an extremely broad 30(b)(6) deposition of Visa) and responses to undefined document
18 requests to respond to Visa's motion, Maritz cannot explain what material disputed facts justify
19 that discovery. This is because there are no such disputed facts. The content of the parties'
20 relevant communications between April 20 – when the contract was terminated – and July 10 –
21 when the Letter Agreement was executed – are not, in all material respects, disputed. And those
22 undisputed facts demonstrate, as a matter of law that Visa owed no duty to disclose.

23 Maritz's transparent campaign to delay the arbitration to which it agreed by procedural
24 gambits must end. Maritz's request for discovery should be denied and the parties ordered to
25 arbitrate in accordance with the terms of the Letter Agreement.

26 **II. RELEVANT FACTS**

27 In April 2006, Visa U.S.A. Inc. ("Visa") and Maritz Inc. d/b/a Maritz Loyalty Marketing
28 ("Maritz") entered into a Master Services Agreement and related agreements (the "MSA") under

1 which Maritz agreed to develop, deploy, operate and maintain a highly complex points rewards
 2 system for Visa and its member financial institutions. The MSA contained a number of
 3 milestones, including that the Phase I-A Launch Date was set for September 30, 2006. (MSA, p.
 4 3.) The MSA expressly provided that meeting this date was critical: “Time is of the essence of
 5 this Agreement. The Parties agree that failure by Maritz to release the Phase I-A Software, to
 6 migrate the existing Cardholder accounts from the existing Visa rewards program to the Rewards
 7 Platform...on or before the Phase I-A Launch Date will result in damages to Visa.” (MSA,
 8 XXIII, R at p. 34.) The MSA further provided for payments by Maritz to Visa of liquidated
 9 damages of up to \$70,000 *per day* of delay in the Phase I-A Launch. (*Id.*)

10 Maritz, however, failed to meet the Phase I-A Launch Date. After months of unacceptable
 11 performance by Maritz, Visa finally terminated the MSA on April 20, 2007. Visa’s April 20
 12 letter, which is mentioned only in passing in a footnote in Maritz’s brief, unambiguously stated:

13 We reserve all rights relating to or arising out of the Agreement and
 14 any Related Agreement, including, without limitation, **claims Visa**
 15 **has against Maritz for Maritz’s breaches of the Agreement,**
 16 **Maritz’s non performance or delay in performing any**
obligations due under the Agreement (including any Related
Agreement), and Visa’s right to liquidated damages.

17 (*See* D.E. #27, Declaration of R. Thompson In Support of Visa’s Motion To Stay Action
 18 (“Thompson Motion To Stay Decl.”), Ex. B.) Following this letter, the parties had a limited
 19 number of communications before the Letter Agreement was executed:

20 On or about April 23, 2007, Maritz’s Associate General Counsel, Steve Gallant, reviewed
 21 Visa’s April 20, 2007 letter, including the “reservation of rights” provisions quoted immediately
 22 above. (D.E. #46, Declaration of S. Gallant In Support of Maritz’s Opposition To Motion To
 23 Stay Action and To Compel Arbitration (“Gallant Decl.”) ¶¶ 2 and 6.)

24 In its May 7, 2007 letter, Maritz claimed it was owed \$5.2 million and stated “[a]s Visa
 25 has reserved all of its rights relating to or arising out of the Agreement or any Related Agreement,
 26 Maritz does the same.” (D.E. #27, Thompson Motion To Stay Decl., Ex. C.) In Visa’s June 5,
 27 2007 response, Visa informed Maritz that Visa would “provid[e] additional information to Maritz
 28 as to **the nature and amount of Visa’s claims** at the appropriate time.” (D.E. #27, Thompson

1 Motion To Stay Decl., Ex. D; emphasis added.)

2 On July 2, 2007, Visa sent a letter to Maritz stating that it was time to “discuss Maritz’s
3 claims, **as well as the nature and amount of Visa’s claims**,” but “[b]efore starting that
4 discussion, and to protect both parties, [Visa] believe[s] that we should reach an understanding as
5 to the process for resolving all claims in the event that something more than direct negotiation is
6 required.” That letter reiterates: “It is important to have this agreement on process in place
7 **before we commence negotiations** so that both sides will know the alternative to a negotiated
8 resolution.” (D.E. #27, Thompson Motion To Stay Decl., Ex. E; emphasis added.)

9 Following Maritz’s receipt of the July 2 letter – which for the first time proposed
10 arbitration – the only contact between parties that in any way related to arbitration prior to execu-
11 tion of the Letter Agreement on July 10 were between Visa’s outside counsel, Rod Thompson,
12 and Maritz’s counsel, Steve Gallant. (D.E. #27, Thompson Motion To Stay Decl., ¶ 8, Ex. G.)

13 Between July 5 and July 10, Mr. Thompson and Mr. Gallant exchanged voicemails and
14 engaged in at least one brief conversation which focused exclusively on the dispute resolution
15 procedure. (*See* Declaration of R. Thompson In Support of Visa’s Opposition To Maritz’s
16 Request For Discovery (“Thompson Decl.”), ¶3) In none of those communications did either
17 discuss the magnitude of either party’s damages and neither Mr. Gallant nor Mr. Thompson asked
18 any questions directed at the level of damages either party was claiming. (*Id.* at ¶ 7.)

19 On July 10, Maritz signed the Letter Agreement. The Letter Agreement itself states that it
20 applies to the parties “**respective claims for damages**.” (D.E. #27, Thompson Motion To Stay
21 Decl., Ex. F; emphasis added.) In his email returning the executed copy, Mr. Gallant confirmed
22 that the Letter Agreement “outlin[ed] the procedures for resolving **any differences that may**
23 **exist between Visa and Maritz**.” (Thompson Motion To Stay Decl., Ex. G; emphasis added.)

24 On July 23, upon his return from vacation, Maritz’s counsel for the first time asked about
25 the magnitude of Visa’s damages.¹ In response to that inquiry, Mr. Thompson disclosed that Visa

26 ¹ Maritz purports to make much of the fact that this conversation did not occur “until
27 approximately two weeks *after* the July 9 Letter containing the agreement to arbitrate was
28 signed.” (Maritz’s Brief, 4:15-17 (emphasis in original); see also summary of argument at 12
 (“Visa failed to disclose the nature and magnitude of its damages claim until July 23, 2007, two
 weeks *after* Maritz agreed to arbitrate”); 5:10 (“Visa continued its concealment until July 23,

1 estimated its damages in the tens of millions. (D.E. #27, Thompson Motion To Stay Decl., ¶ 9.)

2 These facts are undisputed. Even construing them most favorably to Maritz, these facts
3 do not, and cannot, create a duty on Visa to have disclosed the “nature and magnitude” of its
4 damages claims prior to the execution of the Letter Agreement.

5 **III. ARGUMENT**

6 **A. Maritz Has Failed To Submit Evidence Showing A Genuine Issue Of Material** 7 **Fact.**

8 The predicate of Maritz’s request is that it “is entitled to a jury trial on whether the
9 arbitration provision” was induced by fraud. (D.E. #56, Maritz’s Brief, summary of argument:14-
10 15; see also 11:3-12:28.) Maritz, however, “cannot obtain a jury trial merely by demanding one”;
11 Maritz bears the “burden of showing that it is entitled to a jury trial under §4 of the [FAA].”
12 *Doctor’s Assocs. v. Stuart*, 85 F.3d 975, 983 (2d Cir. 1996), *aff’d* 107 F.3d 126 (2d Cir. 1997);
13 *see also Cohen*, 841 F.2d at 286-88 (holding party claiming fraud in the inducement of arbitration
14 provision not entitled to jury trial because party unable to demonstrate duty to disclose). The
15 party resisting arbitration must submit evidence showing there exists a genuine issue of material
16 fact, as when opposing a motion for summary judgment; otherwise the Court may determine the
17 issue as a matter of law. *Geoffroy v. Washington Mutual Bank*, 484 F. Supp. 2d 1115, 119 (S.D.
18 Cal. 2007) (finding no issues of disputed fact and determining enforceability of arbitration clause
19 as a matter of law); *Perez v. Maid Brigade*, 2007 U.S. Dist. LEXIS 78412 *10 fn. 4 (N.D. Cal.
20 2007) (citing *Doctor’s Assocs.*). And, as Maritz concedes, it “bears the burden of showing that
21 [it] is entitled to a jury trial.” *Doctor’s Assocs. v. Distajo*, 107 F.3d 126, 129 (2d Cir. 1997)
22 (citing *Stuart*, 85 F.3d at 983).

23 A standard similar to that on a motion for summary judgment is applied to a motion to
24

25 2007”); 5:23-24 (“[i]t was not until July 23, 2007 that Thompson told Gallant for the very first
26 time that Visa was seeking tens of millions of dollars from Maritz”). Maritz fails to explain why
27 this matters. Moreover, the implication that Visa somehow delayed making such a disclosure is
28 disingenuous. Mr. Gallant returned from vacation on July 23. (Gallant Decl., ¶. 23.) Upon his
return to the office, Mr. Gallant asked *for the first time* about the magnitude of Visa’s claims;
Mr. Thompson immediately told Mr. Gallant that Visa’s claim “was considerable, in the range of
tens of millions.” (D.E. #27, Thompson Motion To Stay Decl, ¶ 9.)

1 compel arbitration. *Garbacz v. A.T. Kearny, Inc.*, 2006 U.S. Dist. LEXIS 20135 *5-6 (N.D. Cal.
 2 2006). “The burden is on the party seeking additional discovery [pursuant to Rule 56(f)] to
 3 proffer sufficient *facts* to show that the evidence sought exists . . . and that it would prevent
 4 summary judgment.” *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir. 1996).
 5 Here, Maritz has failed to proffer such facts – indeed, there is no genuine issue of material fact
 6 that either justifies discovery or creates any duty on Visa to disclose.

7 **B. Maritz Fails To Identify Any Disputed Issue of Material Fact Justifying**
 8 **Discovery**

9 Maritz baldly asserts that “there are disputed factual issues relating to whether Visa
 10 fraudulently induced Maritz into agreeing to arbitrate.” (D.E. #56, Maritz’s Brief, 12:7-8.) Yet,
 11 Maritz fails to identify what those disputed facts are. Indeed, that Maritz has already submitted
 12 four detailed declarations² is in itself strong proof that Maritz needs no discovery to respond to
 13 Visa’s motion. Maritz contends that the facts do not support Visa’s underlying claims for
 14 damages, but that is no reason for discovery regarding Maritz’s fraudulent inducement claim.
 15 The facts relevant to that assertion are either known to Maritz (its reliance and whether it was
 16 reasonable) or not disputed (Visa was aware of its claims and damages theory in July).

17 Maritz itself argues that the crux of its request to take discovery is its belief that “Visa
 18 knew the nature and magnitude of its damages prior to sending the July 9, 2007 letter and had
 19 decided not to disclose that material information to Maritz” prior to the Letter Agreement’s
 20 execution. (D.E. #56, Maritz’s Brief, 6:3-5.) But these facts are essentially³ undisputed, and thus
 21 cannot support Maritz’s claimed need for discovery. Indeed, although Maritz ignores it, Visa
 22 repeatedly *disclosed in writing* to Maritz before the Letter Agreement was executed both that
 23

24 ² Each of these declarations is riddled with inadmissible testimony. (See Visa’s Objections,
 25 DE #s 57 and 58.)

26 ³ Prior to the execution of the Letter Agreement, Visa admittedly knew both that (1) it had
 27 claims against Maritz arising out of Maritz’s breaches of the MSA and/or failure to perform
 28 pursuant to the MSA and (2) that the damages suffered by Visa were in the tens of millions. Visa
 has not, however, completed either its analysis of the underlying facts or its damages and thus it is
 incorrect for Maritz to assert that Visa knew “the exact amount of its claim” prior to execution of
 the Letter Agreement.

1 Visa had claims against Maritz and that it would discuss the nature and amount of those claims
2 with Maritz *after* a protocol to resolve the parties disputes had been entered.

3 Specifically, the April 20 letter expressly states, “Visa **has** [claims] against Maritz for
4 Maritz’s breaches of the Agreement . . . Maritz’s non-performance or delay in performing
5 obligations due under the Agreement . . . , and Visa’s right to liquidated damages pursuant to” the
6 Agreement. (*See* D.E. #27, Thompson Motion To Stay Decl., Ex. B.) Thus, no matter what
7 Mr. Gallant claims he thought this language to mean,⁴ there can be no genuine issue of material
8 fact as to whether Visa disclosed to Maritz prior to the execution of the Letter Agreement that
9 Visa had claims for Maritz’s “breaches of the Agreement,” “non-performance or delay” and
10 pursuant to the Agreement’s liquidated damages clause. In the same vein, Visa’s June 5 letter
11 unambiguously states that Visa will “provid[e] additional information to Maritz as to the nature
12 and amount of Visa’s claims at the appropriate time.” (*See* D.E. #27, Thompson Motion To Stay
13 Decl., Ex. D.)

14 Similarly, the July 2 letter states “Visa would discuss Maritz’s claims, **as well as the**
15 **nature and amount of Visa’s claims.**” The July 2 letter continues, however, to say that “[**b**]efore
16 **starting that discussion, and to protect both parties,** we believe that we should reach an
17 understanding as to the process for resolving all claims in the event that something more than
18 direct negotiation is required. . . . It is important to have this agreement on process in place
19 **before** we commence negotiations so that both sides will know the alternative to a negotiated
20 resolution.” (*See* D.E. #27, Thompson Motion To Stay Decl., Ex. G.) Thus, there can be no
21 dispute that Visa disclosed to Maritz that Visa would discuss “the nature and amount of Visa’s
22 claims” *after* the parties agreed on a process for resolving those claims. Although Maritz
23 apparently claims it misread this language as well,⁵ that Visa expressly told Maritz that it would

24 ⁴ Mr. Gallant states “I considered Ms. Buse’s ‘reservation of rights’ language in her April
25 20 letter to be simply standard language to preserve Visa’s ability to object to the amount that
26 Visa would have to pay Maritz in light of Visa’s ‘for convenience’ termination.” (D.E. #46,
27 Gallant Decl., ¶ 6.) It is, frankly, impossible to read the plain language of the April 20 letter as
28 Mr. Gallant now claims. But even assuming Mr. Gallant did “consider” the April 20 letter as he
testifies, his misreading cannot somehow create an obligation that Visa repeat what it said.

⁵ Mr. Gallant states he “considered the ‘reservation of rights’ language [in Visa’s June 5
and July 2 letters] to be redundant to that of the April 20 letter.” (D.E. #46, Gallant Decl., ¶ 6.)

1 make such a disclosure *after* such a process had been agreed to demonstrates, as a matter of law,
2 that Visa had no duty to make such a disclosure *before* the Letter Agreement was entered.⁶

3 Indeed, the July 2 letter shows that Visa expressly told Maritz that “to protect both
4 parties,” details regarding the parties’ respective claims would be discussed only after “an
5 understanding as to the process for resolving all claims” was reached. (*See* D.E. # 27, Thompson
6 Motion To Stay Decl., Ex. G.) This refers to the need to have an agreement in place that such
7 discussions would be covered by the protections of California’s mediation protections (which is
8 precisely what the parties agreed to on July 24) so that any statements made could not be used in
9 any way if the discussions failed to resolve the disputes. The scope of the mediation protections
10 is extremely broad. As the California Supreme Court recently explained: “[w]e have repeatedly
11 noted that the mediation confidentiality provisions of the Evidence Code were enacted to
12 encourage mediation by permitting the parties to frankly exchange views, without fear that
13 disclosures might be used against them in later proceedings.” *Fair v. Bakhtiari*, 40 Cal. 4th 189,
14 194 (2006) (citations omitted).⁷ The fact that Visa expressly told Maritz this – coupled with the
15 fact that Visa only disclosed an estimate of its damages *after* such an agreement was executed –
16 underscores that Visa could not have had a duty to disclose the magnitude of its damages claims
17 prior to execution of the Letter Agreement.

18 ⁶ Another fundamental flaw to Maritz’s claim is that it is premised on Visa’s purported
19 obligation to disclose its estimate of damages. Visa’s estimate of its damages, however, is its
20 attorneys’ work product. As a matter of law, a claim of fraud in the inducement cannot be
21 predicated on the fact that a party failed to disclose its counsel’s evaluation of the strengths and
22 weaknesses of the case. *See Hickman v. Taylor*, 329 US 495, 511 (1947) (describing scope of
23 work product doctrine).

24 ⁷ The *Fair* court reiterated that “the statutory scheme . . . unqualifiedly bars disclosure of
25 communications made during mediation absent an express statutory exception.” *Fair v. Bakhtiari*,
26 40 Cal.4th at 194 (citations omitted). Unfortunately, Maritz has included in its brief the estimate
27 of Visa’s damages claims that was discussed at the parties’ mediation. (Maritz’s Brief, 5:23-28.)
28 Before Visa provided this estimate to Maritz the parties agreed *in writing* that all such
communications would be protected as mediation communications under Cal. Evid. Code Section
1119, et seq. Maritz then broke that agreement by citing the estimate of Visa’s damages used in
the mediation to the AAA. Although Maritz argues that Visa has “publicly disclosed this amount
twice in this litigation” what Maritz cites to is **Maritz’s** November 26, 2007 letter to the AAA in
which **Maritz** improperly disclosed to the AAA what Visa’s mediation estimate of its damages
were. That copies of Maritz’s November 26 letter have been attached to Declarations submitted
by Mr. Thompson does not somehow cause the protections of the mediation rules to evaporate.
Simply put, as *Fair* holds, neither party may use anything said during the mediation process for
any purpose absent compliance with California’s evidence code.

1 The facts relevant to Maritz's fraud claim are undisputed. There is, therefore, no need for
2 any discovery to rule on Visa's Motion to Stay.

3 **C. As A Matter Of Law, Visa Had No Duty To Disclose The Magnitude of Its**
4 **Damages.**

5 The alleged concealment of a material fact is not actionable unless there is a duty to
6 disclose. *Highland Fed. Sav. & Loan*, 14 Cal. App. 4th at 1718-19. A finding of duty is of
7 paramount importance in a nondisclosure claim because a party to a business transaction can have
8 no liability to the other party without the requisite showing of duty. *See TV Events & Mktg. v.*
9 *AMCON Distrib. Co.*, 488 F. Supp. 2d 1071, 1081 (2006) (citing Restatement (Second) of Torts
10 § 551 comment a.) This is true even if the party charged knows both that the other party is
11 ignorant of the fact and that the other party would regard the fact as material. *Id.*

12 Maritz concedes the facts described above regarding the parties' communications leading
13 up to the execution of the Letter Agreement.⁸ Maritz also concedes, as it must, that to state a
14 claim based on Visa's purported concealment, Maritz must demonstrate that Visa had a duty to
15 disclose. *See* Section 551(1) of the Restatement (2d) of Torts ("One who fails to disclose to
16 another a fact that he knows may justifiably induce the other to act or refrain from acting in a
17 business transaction is subject to the same liability to the other as though he had represented the
18 nonexistence of the matter that he has failed to disclose *if, but only if, he is under a duty to the*
19 *other to exercise reasonable care to disclose the matter in question.*") (emphasis added).

20 Maritz's claim is similar to that rejected by the Ninth Circuit in *Cohen*. There, plaintiffs
21 claimed they had been fraudulently induced into an arbitration provision and demanded that they
22 receive a jury trial on the question. The district court ordered the parties to arbitrate. Plaintiffs
23

24 ⁸ Maritz's reliance on *In re Mediscan Research*, 940 F.2d 558, 561-63 (9th Cir. 1991) is
25 puzzling. There, defendant's argument that the evidence was insufficient to establish a duty to
26 disclose was rejected because the lower court had found that defendants "*actively participated in*
27 *and assisted in defrauding and concealing the truth from Mediscan's limited partners. Thus, the*
28 *fact that the officers of GE&T themselves did not make affirmative misrepresentations to the*
limited partners does not undermine the bankruptcy court's finding." 940 F.2d at 562 (emphasis
in original). Alternatively the court found that defendant had a duty to disclose because
defendant had received after-acquired information, which made a previous representation false.
940 F.2d at 562 n. 4. Neither factor is present here.

1 appealed, arguing that they had not understood the language of the agreement they signed and
 2 that defendant had failed “to disclose the effect of the arbitration clause.” 841 F.2d at 286.
 3 Holding that plaintiffs did not produce facts giving rise to a duty to disclose, the Ninth Circuit
 4 affirmed, explaining, “[w]e know of no case holding that parties dealing at arm’s length have a
 5 duty to explain to each other the terms of a written contract.” 841 F.2d at 287.

6 The same result is required here. The Letter Agreement unambiguously states that it
 7 governs “our clients’ [Visa and Maritz] respective claims for damages.” As the Ninth Circuit
 8 explained in *Cohen*, Maritz’s contention that, despite this unambiguous language, the Letter
 9 Agreement really only applies to whatever claims Maritz had against Visa fails as a matter of law:

10 We see no unfairness in expecting parties to read contracts before they
 11 sign them. As the First Circuit stated in *Turner*, ‘if a jury is allowed to
 12 ignore contract provisions directly at odds with oral representations
 13 allegedly made during negotiations, the language of a contract simply
 14 would not matter anymore Contracts would become no more than
 15 presumptive statements of the parties’ intentions, instead of legally
 16 enforceable agreements. 809 F.2d at 96. This reasoning is particularly
 17 persuasive in the context of arbitration clauses, where permitting
 18 plaintiffs to present their claims to a jury would frustrate the very
 19 policies these clauses, and the Arbitration Act itself, are meant to
 20 promote. **We therefore hold that allegations of misrepresentations
 21 directly contrary to the specific and unambiguous terms of a
 22 written arbitration agreement do not, as a matter of law, state a
 23 claim for fraud.**

24 841 F.2d at 287-88 (emphasis added; ellipses in original).

25 Nevertheless, Maritz asserts Visa owed such a duty because (a) Visa was a fiduciary of
 26 Maritz; (b) Visa made “partial or ambiguous statements”; or (c) Visa’s knew a fact “basic to the
 27 transaction,” about which Visa knew both that Maritz was mistaken and which it would expect
 28 Visa to disclose. None of these arguments has merit.

29 **1. Visa And Maritz Did Not Have A Fiduciary Or Similar Relationship of** 30 **Trust or Confidence.**

31 A party to a business transaction is liable for failure to disclose a material fact only where
 32 there is a duty to exercise reasonable care in disclosing the fact before the transaction is
 33 consummated. Restatement (Second) of Torts, § 551. Section 551(2)(a) states, “[a] party to a
 34 business transaction is under a duty to exercise reasonable care to disclose to the other before the

1 transaction is consummated, matters known to him that the other is entitled to know because of a
2 fiduciary or other similar relation of trust and confidence between them.”

3 Maritz baldly asserts that the MSA’s provision that the parties shall “act in good faith
4 in resolving any disputes under the MSA” created “a relationship of trust and confidence.” (D.E.
5 #56, Maritz’s Brief, 6:25-7:1.) Maritz cites no authority supporting this conclusion, nor does it
6 present any analysis that would establish that a mutual agreement to act in good faith constitutes a
7 relationship of trust or confidence such as that shared between fiduciaries. Moreover, Maritz’s
8 bald conclusion is rejected by the very terms of the contract upon which it relies. On the same
9 page where the good faith provision appears, MSA Section XXIII, C states, “**Relationship of the**
10 **Parties.** The Parties to this Agreement intend that each will act as independent contractor of the
11 other in the performance hereof.” Parties to commercial contracts are not fiduciaries, unless one
12 party agrees to serve as a fiduciary. *Householder Group LLLP v. Fuss*, 2007 U.S. Dist. LEXIS
13 44220 *9 (N.D. Cal. 2007). Furthermore, where the contract provides that the parties are
14 independent contractors and prohibits one party from acting in a joint venture or as an agent or
15 employee of the other, there is no fiduciary relationship. *Id.*

16 Moreover, an obligation to act in good faith, alone, cannot create a fiduciary relationship.
17 All contracts have an implied covenant to act in good faith. *Creager v. Yoshimoto*, 2007 U.S.
18 Dist. LEXIS 77309, *6 (N.D. Cal. 2007). If an obligation to act in good faith creates a fiduciary
19 relationship, then all contracts create fiduciary relationships. Such a finding would contradict the
20 general rule that a party to a business transaction owes no duty of disclosure to the other
21 contracting party. *See* Restatement (2d) of Torts, § 551(1). Maritz’s claim that Visa owed it a
22 duty like that of a fiduciary is simply untenable.

23 2. Visa Did Not Make Any Partial Or Ambiguous Statements Regarding 24 The Amount Of Its Damages Claim.

25 Alternatively, Maritz argues that it “was misled and deceived into agreeing to arbitrate by,
26 among other things, Visa’s conduct and statements indicating that the only question was how
27 much Visa would pay of the \$5.2 million that Maritz believed it was owed.” (D.E. #56, Maritz’s
28 Brief, 8:27-9:1.) Preliminarily, as the Ninth Circuit held in *Cohen*, because such purported

1 statements contradict the Letter Agreement's statement that it governs the parties "*respective*
2 claims for *damages*," as a matter of law, such statements cannot support a fraud claim.

3 Moreover, Maritz fails to identify any "conduct and statements" made by Visa that
4 support this accusation. Other than what is written in Visa's April 20, June 5 and July 2 letters,
5 there is no evidence of any communication between the parties regarding "the nature and
6 amount" of Visa's claims. The issue of an alternative dispute resolution protocol, including
7 binding arbitration, was first raised in Visa's July 2, 2007 letter. It is undisputed that from that
8 date until the execution of the Letter Agreement, the only communications related to the Letter
9 Agreement were those between Mr. Thompson and Mr. Gallant, who did not discuss either the
10 nature of their respective clients' claims or their estimates of the damages their respective clients
11 were owed. (*See* Thompson Decl., ¶. 7; D.E. #46, Gallant Decl., ¶ 15.)⁹

12 Nevertheless, Maritz argues that Visa made "partial, misleading and ambiguous"
13 statements before the termination. Even assuming *arguendo* that such statements were made,
14 none give rise to the duty that Maritz now urges. Again, Maritz ignores the April 20 letter which
15 states unambiguously that Visa is reserving "all rights relating to" all "claims Visa has against
16 Maritz for Maritz's breaches of the Agreement, for non-performance or delay in performing...and
17 Visa's right to liquidated damages." Thus, even assuming *arguendo* that some ambiguity could
18 have been created in Maritz's mind regarding whether Visa believed it had claims against Maritz
19 before the termination, that ambiguity was clarified by Visa's April 20, June 5 and July 2 letters.
20 (*See* D.E. #27, Thompson Motion To Stay Decl., Exs. B, D, and E, respectively.) Visa's
21 unequivocal written statements eviscerate any claim that Visa had a duty to disclose based on
22 purportedly ambiguous prior statements.¹⁰

23 ⁹ Relying upon inadmissible portions of Mr. Gallant's Declaration, Maritz argues that
24 "[b]ased on the conversations between Gallant and Thompson, Gallant was led to believe that he
25 and Thompson were trying to devise a process for determining the amount that Visa owed Maritz
26 under the MSA in light of Visa's termination." (Maritz's Brief, 4:7-10.) But nowhere in the
27 Gallant declaration is there description of what Mr. Thompson purportedly said that allegedly
28 "led [Gallant] to believe" this. This is because there are no facts to support this conclusion – as a
matter of fact neither Mr. Thompson nor Mr. Gallant discussed the size of either of their clients' claims during the negotiations of the Letter Agreement.

¹⁰ Maritz's reliance on *Ach v. Finkelstein*, 264 Cal. App. 2d 667, 674 (1968), is also
puzzling. (D.E. #56, Maritz's Brief, 7:14-16; 10:8-18.) In *Ach* after buying an apartment house

1 **3. Visa Had No Duty to Disclose Under Subsection (2)(e).**

2 Finally, Maritz argues that a duty to disclose was created under Section 551(2)(e).
 3 (Maritz's Brief, 8:1-8.) That section states that a party must disclose facts basic to the
 4 transaction, if he knows that the other is about to enter into it under a mistake as to them, and that
 5 the other, because of the relationship between them, the customs of the trade or other objective
 6 circumstances, would reasonably expect a disclosure of those facts. Restatement (2d) of Torts,
 7 § 551(2)(e). Thus the section has two required elements: (1) that Visa knew Maritz's
 8 understanding of an underlying basic fact was mistaken and (2) that the relationship required Visa
 9 to correct that misunderstanding. Maritz can satisfy neither.

10 Addressing the second prong first, as discussed above, there simply are no facts to support
 11 Maritz's contention that the parties had a fiduciary type relationship. Maritz has provided no
 12 evidence that the course of conduct between the parties, the customs of the trade or other
 13 objective circumstances, caused Maritz to reasonably expect that Visa would make any disclosure
 14 to Maritz, much less a disclosure of an estimate of Visa's damages claim. Although Maritz again
 15 relies upon the MSA's provision requiring that the parties act in good faith to resolve their
 16 disputes, as explained above, that provision does not create any obligation on Visa to disclose an
 17 estimate of its damages claims to Maritz prior to the execution of the Letter Agreement.

18 With respect to the known mistaken "fact basic to the transaction" prong, Maritz's
 19 argument again fails. Maritz cannot deny that it knew its serious breaches of the MSA caused
 20 Visa damages. For example, Maritz knew that it failed to launch by the contractually mandated
 21 date of September 30, 2006 and that in fact no launch occurred before Visa terminated the
 22 contract on April 20, 2007. Instead Maritz contends that it believed in November 2006 that Visa

23
 24
 25 from defendants, plaintiffs sued, alleging that defendants had failed to disclose certain rent
 26 concessions. In affirming a jury verdict for plaintiffs, the *Ach* court found that "the evidence
 27 demonstrates that defendants knew the rentals set forth in the leases based upon a yearly rental
 28 were false and misleading." 264 Cal.App.2d at 675. The *Ach* court concluded "that these leases
 and the way in which they were drawn reflect a scheme of giving rent concessions to inflate the
 rentals above their true market value so that a higher price could be obtained for the apartment
 building." 264 Cal.App.2d at 676. Here, Maritz cites to nothing that Visa said or did that was
 purportedly "false and misleading."

1 waived its rights to claim damages for the missed launch date.¹¹ But Maritz's waiver argument is
 2 at most a defense to the merits of Visa's claim. It does not justify Maritz's speculation that "Visa
 3 knew that Maritz did not realize Visa was claiming Maritz owed tens of millions of dollars."
 4 (D.E. #56, Maritz's Brief, 8:4-5.) To the contrary, that argument is belied by the April 20 letter
 5 where Visa reserved its "right to liquidated damages." Whatever Visa's state of mind in
 6 November 2006, there is no support for Maritz's assertion that Visa knew Maritz (supposedly)
 7 mistakenly ignored that express terms of Visa's April 20, June 5 and July 2 letters.

8 More crucially, as a matter of fact, from the time arbitration was proposed (July 2), until
 9 the Letter Agreement was signed (July 10), there was no discussion at all between the parties
 10 regarding the "nature and magnitude" of either party's claims; rather the only thing discussed was
 11 a procedure to resolve "all disputes [between Visa and Maritz] outside of court." (D.E. #27,
 12 Thompson Motion To Stay Decl., Ex. F, fn. 1. Maritz identifies nothing during those
 13 negotiations that either Visa or its counsel said that was in any way inaccurate or misleading.

14 **D. In Any Event, There Is No Need For The Discovery Requested By Maritz To**
 15 **Resolve Visa's Pending Motion to Stay.**

16 Again, Maritz has identified no need for discovery from Visa to respond to Visa's Motion
 17 to Stay: the only unwritten communications relating to the negotiation of the Letter Agreement
 18 were those between Messrs. Thompson and Gallant. With respect to those communications, Visa
 19 offered to make Mr. Thompson available for deposition. Maritz rejected that offer, rather
 20 dramatically illustrating that it has no true need for discovery.

21 "The burden is on the party seeking additional discovery [pursuant to Rule 56(f)] to
 22 proffer sufficient *facts* to show that the evidence sought exists . . . and that it would prevent
 23 summary judgment." *Nidds*, 113 F.3d at 920; *see also Mackey v. Pioneer Nat'l Bank*, 867 F.2d
 24 520, 523-24 (9th Cir. 1989) ("A Rule 56(f) motion must show how additional discovery would

25
 26 ¹¹ For example, Maritz claims that in a comment in a November 2006 email Visa agreed to
 27 waive any claim for liquidated damages. (*See* Maritz's Brief, 7:5: "the November 2006 waiver
 28 of punitive [sic] damages.") Visa denies that any such waiver occurred. The MSA specifies a
 process through which it can be amended, a process that the parties followed both before and after
 the purported November "waiver."

1 preclude summary judgment and why a party cannot immediately provide ‘specific facts’
 2 demonstrating a genuine issue of material fact.”). Here, Maritz has made no such showing.

3 Although Maritz seeks to depose three Visa executives (Elizabeth Buse, Tim Attinger and
 4 Tad Fordyce) and a consultant (John McCarthy), Maritz does not explain *why* it needs such
 5 discovery. Maritz, of course, can submit declarations stating what it contends Visa and/or
 6 Mr. McCarthy told it in opposition to Visa’s motion; indeed, Maritz has done so. That does not
 7 mean, however, that Maritz needs to depose anyone. For example, presumably Maritz seeks
 8 confirmation from Mr. McCarthy that he said “that technology did not play a part in Visa’s
 9 decision to terminate the MSA.” (D.E. #56, Maritz’s Brief, 3:5-6.) Yet, given the current
 10 procedural posture, even if Mr. McCarthy denied saying that, it would only create a disputed
 11 issue of fact (assuming both that Maritz submitted a declaration detailing Mr. McCarthy’s alleged
 12 statement and that what Mr. McCarthy purportedly said is somehow relevant). The same is true
 13 for Mr. Fordyce (who is mentioned in Mr. Peterman’s declaration). With respect to Ms. Buse and
 14 Mr. Attinger, why Maritz believes it needs either’s deposition is a mystery – there is no mention
 15 of anything Ms. Buse or Mr. Attinger is purported to have said to anyone at Maritz in any of
 16 Maritz’s papers. Perhaps more importantly, there is no mention of anything that Maritz believes
 17 it needs to learn from any of these individuals to oppose Visa’s motion.

18 The same is true with respect to the 12 broadly-worded “topics” on which Maritz seeks
 19 “to obtain documents and take Rule 30(b)(6) depositions.” (D.E. #56, Maritz’s Brief, 14:11-12.)
 20 Notably, Maritz has not submitted either a 30(b)(6) deposition notice or document request that it
 21 seeks leave to serve, alone a basis to deny this request. Moreover, Maritz again fails to explain
 22 why it needs such discovery to respond to Visa’s motion. For example, Maritz requests a
 23 deposition and documents regarding “when Visa determined the amount it was allegedly owed
 24 and how that amount would be calculated.”¹² (D.E. #56, Maritz’s Brief, 13:5-6.) Presumably
 25 what Maritz really seeks to learn is when Visa knew it had “significant” claims against Maritz.

26 ¹² Such a topic is based upon a false assumption (that Visa has finally determined the
 27 amount it is owed by Maritz) and is an improper attempt to take damages related discovery
 28 prematurely – whatever estimates Visa currently has are protected by the attorney work product
 doctrine.

1 But, again, it is undisputed that Visa believed it had significant claims against Maritz prior to the
 2 execution of the Letter Agreement; this is why the Letter Agreement expressly applies to the
 3 parties' "respective claims for damages." Given this "admission," why does it matter whether
 4 Visa knew this on April 1 or May 1 or July 1 or any other date? Simply put, Maritz needs no
 5 discovery to respond to Visa's Motion to Stay.

6 **IV. CONCLUSION**

7 Predicated on its purported misreading of Visa's April 20, June 5 and July 2 letters, Maritz
 8 has asserted serious accusations of fraud and deceit against Visa and its counsel. Although
 9 Maritz claims that it was "misled" into signing the Letter Agreement, the undisputed facts
 10 demonstrate that, before the Letter Agreement was executed, Visa clearly disclosed both that it
 11 believed it had claims against Maritz and that Visa would discuss the magnitude of its claims with
 12 Maritz *after* the parties had agreed upon a process to resolve all of their disputes.

13 Even if taken as true, Maritz's counsel's misreading of Visa's unambiguous letters
 14 cannot – and does not – somehow create a duty requiring Visa to correct that misunderstanding.
 15 Maritz cites no statement by Visa that is even arguably ambiguous or partial regarding the scope
 16 of Visa's damages claims. Moreover, Maritz does not (and could not) allege that it made any
 17 inquiry as to the "nature and amount of Visa's damages" until after the Letter Agreement was
 18 signed. Since Maritz has presented no facts that, if true, would create a duty to disclose, Maritz's
 19 claim of fraud in the inducement is defective as a matter of law. Maritz's motion should be
 20 denied and this case stayed pending resolution of the arbitration.

21
 22 Dated: February 4, 2008

FARELLA BRAUN & MARTEL LLP

23
 24 By: /s/Roderick M. Thompson
 25 Roderick M. Thompson

26 Attorneys for Plaintiff VISA U.S.A. INC.